Filed 1/26/10 In re A.L. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re A.L., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B215197 (Super. Ct. No. J-1252168) (Santa Barbara County)
SANTA BARBARA COUNTY CHILD WELFARE SERVICES, Plaintiff and Respondent, v. M.H., Defendant and Appellant; A.L., Real Party in Interest.	

Mother appeals from an order of the juvenile court denying a modification petition that was filed by her sister, Bethany G., and her sister's husband, Justin G. (Welf. & Inst. Code, § 388.)[1] We affirm.

We agree with appellant that Child Welfare Services (the agency) should have filed a supplemental petition when the child's non-relative foster mother removed

[1] All statutory references are to this code unless otherwise stated.

the child from a relative's home. (§ 387.) However, the child had by then already lived with the foster mother for 10 months and had formed a strong bond with her. The court did not abuse its discretion when it independently determined that continuing placement with the foster mother was in the best interests of the child, notwithstanding the availability of another qualified relative.

FACTUAL AND PROCEDURAL BACKGROUND

A.L. was born in August 2006. Appellant was 18 years old and unmarried. She has a history of mental illness and was herself a dependent of the court for several years.

During the first year of A.L.'s life, the extended maternal family helped to care for A.L. in the home of the maternal grandmother. The maternal uncle, Ben H., and his long time girlfriend, Bonnie K., were present for A.L.'s birth and were involved in her care. The maternal aunt, Bethany G., and her husband, Justin G., moved to Blythe, California, just before A.L. was born, but they were involved with her care during monthly visits and family gatherings.

In August 2007, when A.L. was a year old, the agency removed A.L. from appellant's care and filed a petition pursuant to section 300. After a few days of emergency foster care, the agency placed A.L. with Ben and Bonnie. The maternal grandmother was not suitable because of her history with the agency. The agency also considered Bethany and Justin, who were qualified, but did not select them because the distance to Blythe would have impeded reunification efforts. (§ 361.3, subd. (a)(7)(G).) No other relatives requested placement.

The juvenile court found that A.L. was a child described by section 300 and that she could not safely remain in appellant's care. The court found that Ben was a suitable and willing relative and granted the agency responsibility for placement in the home of a suitable relative or a licensed foster home. The agency placed A.L. with Ben and his girlfriend, Bonnie, in the home of Bonnie's parents. The extended maternal family continued to help care for A.L., especially on the four days a week that Bonnie

attended college in Azusa, California. Bethany and Justin continued to see A.L. on their monthly visits.

In October 2007, the court found the allegations of the petition to be true. A.L. remained with Ben and Bonnie. According to a children's medical health screener, A.L. was suffering from a reactive attachment disorder resulting from neglect and exposure to violence. She was at risk for future problems with attachment, bonding and vigilance with strangers. The health screener recommended treatment focused on bonding with caretakers.

In January 2008, the court conducted a disposition hearing. A.L. was thriving in the care of Ben and Bonnie. A.L.'s severe nightmares had subsided. Her weight gain had improved. Neither of her parents had been participating in reunification services. The court declared A.L. a dependent and ordered services to continue through April of 2008. A.L. remained with Ben and Bonnie in the home of Bonnie's parents.

By April of 2008, it was clear that reunification would not succeed. A.L. continued to do well placed with Ben and Bonnie. A.L. was healthy, happy, and developmentally on target. She had stabilized in her placement. She no longer had sleep disturbances or the extreme anxiety that she had shown upon placement. Ben and Bonnie moved to an apartment in Grover Beach, and the agency licensed their new home.

Around this time, a conflict arose in the family about who would adopt A.L. if parental rights were terminated. Bonnie wanted to adopt A.L. and the agency supported that plan. Ben was hesitant about adoption. Bethany and Justin also wanted to adopt A.L. In April, Bethany and Justin asked the agency for an application to be assessed for placement. They retained counsel to help them become the adoptive parents The court was unaware of the conflict until August of 2008.

In May 2008, the court terminated services for both parents and set the matter for a hearing in August to make a permanent plan for the child pursuant to section 366.26.

In June or July 2008, Ben and Bonnie separated. Ben had decided against adopting A.L. Bonnie took A.L. back to her parents' home. Bonnie reported the change

to the agency. The agency did not report the changed placement to the court by supplemental petition or otherwise. By this time, A.L. had lived with Bonnie for about 10 of the 22 months of her life, mostly in the home of Bonnie's parents. A.L. had formed a strong bond with Bonnie, who she referred to as "mommy." The agency re-licensed the home of Bonnie's parents for continued placement of A.L., with Bonnie as the sole foster parent.

On July 3, counsel for Bethany and Justin renewed their request to be assessed for placement and adoption. Their counsel wrote that Bonnie had been isolating A.L. from the family since May of 2008. The agency did not include this information in its next report to the court, prepared July 25 and filed August 4, 2008.

The agency's August 2008 report recommended continued placement solely with Bonnie for a plan of adoption. It reported that A.L. was healthy, happy and on target developmentally. The agency reported a strong bond with Bonnie who had been providing "excellent care" since August 2007 and "remained in contact with the child's biological family." It did not mention A.L.'s removal from Ben or the lack of visits with Bethany and Justin. Bonnie filed a request to be designated as the prospective adoptive parent.

Bethany and Justin filed a modification petition, requesting a change of placement from Bonnie to them for a plan of adoption. (§ 388.) They had not seen A.L. since May.

The trial court ordered a bonding study. A clinical psychologist, Dr. Beiley, conducted the study in October 2008 and observed the child's interactions with Bonnie, with Bethany and with Justin. He concluded that A.L. was much more securely attached to Bonnie than to Bethany and Justin.

It was Dr. Beiley's opinion that if A.L. were permanently separated from Bonnie, then A.L. would be at high risk of short term emotional damage and long term adult psychiatric and emotional disorders. Dr. Beiley observed that Bonnie was highly attuned to A.L.'s needs. A.L. was easily consoled by Bonnie, clung to her before

separation, and was excited to see her when reunited. A.L. was comfortable with Bethany and Justin but did not show fear of separation or need for proximity to them.

The court conducted a 13-day contested hearing on the modification petition between November 2008 and March 2009. During this period, A.L. had some supervised visits with Bethany, Justin and other members of the extended family. The court heard from many witnesses, including interested family members, employees of the agency, Dr. Beiley and a licensed marriage, family and child counselor, Dr. Halon, who had been retained by Bethany and Justin.

The court received evidence about the stability of both prospective homes, and the strong parenting skills of each prospective parent. By all reports, Bethany and Justin had a good marriage and were doing an excellent job of raising their own two children in Blythe. At the same time, Bonnie was doing an excellent job of caring for A.L.

The agency's November 2008 report stated that A.L. was thriving as a result of consistent and loving care by Bonnie. A.L. had improved physically, emotionally and socially over the past year. Bonnie was scheduled to graduate with a bachelor's degree in nursing in December 2008 and become a licensed registered nurse. She had multiple job offers in California. Her extended family provided a strong support system.

On the other hand, Dr. Halon testified in January 2009 that it would be fairly easy for A.L. to make the transition from Bonnie to Bethany and Justin. He supported such a change because Bethany and Justin were stable, had been good parents to their own two children, and would give the child access to the extended maternal family, without which she would suffer. According to Dr. Halon, children under the age of three form attachments, but do not yet form permanent bonds and they can reattach to a new caretaker. He questioned Dr. Beiley's neutrality and said that Dr. Beiley's conclusions were not reliable because he had tainted the interactions that he observed.

The trial court denied the modification petition and designated Bonnie as the prospective adoptive parent. The court found that there had been a change in circumstances in July 2008, which the agency should have brought to the court's

attention, but that a change in placement was not in the best interest of A.L. because she had now lived with Bonnie and her family for 18 months, had a strong maternal bond with Bonnie, and did not have that bond with anyone else. The next closest bond was with Ben, but he was not willing to adopt. The court found that A.L. would suffer substantial emotional damage if she were removed from Bonnie and placed with Bethany and Justin. She would suffer long term psychological harm and her ability to form relationships would suffer. The court then terminated the parental rights of both the mother and father.

DISCUSSION

Standing

The agency challenges appellant's standing to appeal from denial of her sister's petition. We reject the challenge because the petition was denied before her parental rights were terminated.

Only an aggrieved party may appeal from a decision of the juvenile court. (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1053.) To be aggrieved, the party must have a legally cognizable interest that is injuriously affected by the decision. (*Ibid.*) A parent has such an interest until their rights are terminated. "Until parental rights are terminated, a parent retains a fundamental interest in his or her child's companionship, custody, management and care." (*Ibid.*)

The agency relies on *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, in which a father did not have standing to appeal a relative placement preference decision that was made before termination of parental rights but after termination of reunification services. In *Cesar V.*, the father had stipulated to termination of reunification services and the appellate court could not "see how the denial of placement with [the grandmother] affect[ed] his interest in reunification with the children." (*Id.* at 1035.) The court nevertheless allowed him to support the grandmother's petition with arguments of his own. (*Ibid.*)

The holding of *Cesar V.* cannot be reconciled with *In re Esperanza C., supra,* 165 Cal.App.4th at p. 1053, but *Esperanza C.* is better reasoned. In *Esperanza C.*,

a mother had standing to appeal a relative placement decision that was made after termination of reunification services but before termination of parental rights. The court noted that a juvenile court is required to consider the placement wishes of the parents even after reunification services are terminated. (§ 361.3, subd. (a)(2); *In re Esperanza C.*, at p. 1053.) Also, even where adoption is the only likely permanent plan, other statutory options are available until parental rights are actually terminated and could result in parental contact. (*Id.* at 1054.) Thus, the mother had a cognizable interest in the child's placement notwithstanding prior termination of services.

All doubts must be construed in favor of the right to appeal. (*In re Matthew C.* (1993) 6 Cal.4th 386, 394.) We conclude that appellant has standing to bring this appeal.

The Change in Placement (§ 387)

As the agency now concedes, the change of placement in July 2008 from Ben and Bonnie to only Bonnie (a non-relative) triggered the requirements of section 387 for a noticed hearing on a supplemental petition. The supplemental petition would have informed the court of the change, and the agency would have been required to state facts sufficient to show that placement with Ben was not appropriate in view of the criteria of section 361.3 for preferential relative consideration. The fact that Ben did not wish to adopt A.L. would have been sufficient to warrant a change in placement (§ 361, subd. (a)(2)), but the agency would have been required to give preferential consideration to other relatives, subject to the child's best interests. (§ 361.3, subds. (a)(1) & (d).) The agency did not file the required petition and did not consider or investigate Bethany and Justin, despite the couple's written request in July 2008.

Where the agency does not adequately consider and investigate relatives for a new placement, the juvenile court must independently evaluate the relative for placement. (*Cesar V. v. Superior Court, supra,* 91 Cal.App.4th at p. 1034.) The court did so when the agency's oversight was brought to its attention in August 2008 by Bethany and Justin's modification petition.

Denial of the Modification Petition (§ 388)

Mother contends that the juvenile court abused its discretion when it denied the modification petition and that its evaluation of A.L.'s best interests would have been different if it had been made in a section 387 hearing just after Ben and Bonnie separated. We disagree. The court's decision was within its discretion and the strong bond between Bonnie and A.L. was well established before Ben and Bonnie separated in June or July of 2008.

We review a juvenile court's decision on a modification petition for abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) We will not disturb its decision unless it exceeds all bounds of reason. (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

To succeed on their modification petition, Bethany and Justin had to prove by a preponderance of the evidence that (1) changed circumstances existed and (2) the proposed change would promote the best interests of the child. (§ 388, subd. (a); *In re Mary G.* (2007) 151 Cal.App.4th 184, 205.) Circumstances changed when Ben and Bonnie separated. The question is whether a change to Bethany and Justin would promote the child's best interests, in view of the statutory preference for relative placement.

The statutory preference for relative placement is in place until parental rights have been terminated. (*Cesar V. v. Superior Court, supra,* 91 Cal.App.4th at pp. 1031-1032.) "'Preferential consideration' means that the relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, subd. (c)(1).) A relative must be considered favorably, subject to the suitability of their home and the best interests of the child. (*Cesar V.* at p. 1033.) The relative seeking placement must be given "a fair chance." (*Ibid.*)

The best interest of the child remains paramount. "Although courts determining a child's best interests under section 388 should carefully evaluate whether a child's distress in severing a temporary bond is simply situational, and not base their decisions on a transitory problem, courts may place great weight on evidence that after a

substantial period in foster care, the severing of a bond with the foster parents will cause long-term, serious emotional damage to the child." (*In re Jamsen O., supra,* 8 Cal.4th at pp. 418-419 [affirming denial of father's request for a change of placement where the child would have suffered emotional damage if removed from non-relative foster parents.])

There is no evidentiary presumption that placement with a relative is in the child's best interest. Preferential consideration of relatives does "not operate as an evidentiary presumption in favor of placement with the [relative] that would overcome the juvenile court's duty to determine the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 320.) "[R]egardless of the relative placement preference, the fundamental duty of the court is to assure the best interests of the child, whose bond with a foster parent may require that placement with a relative be rejected." (*Id.* at p. 321; *In re Jessica Z.* (1990) 225 Cal.App.3d 1089, 1100 [affirming denial of grandmother's request for change of placement at 12 month review hearing where the child had an emotional bond with the non-relative foster family].)

The trial court fully considered Bethany for preferential placement, but gave paramount consideration to the best interests of A.L. (§ 361.3, subd. (d).) The court heard exhaustive testimony about Bethany's home and parenting ability. It carefully considered the question of placing A.L. in her care. It found her home was suitable but that change of placement was not in the child's best interest in view of the child's special bonding needs and her strong and healthy bond with Bonnie. There was evidence in the record from which the court could reasonably reach this conclusion. When two or more inferences can reasonably be deduced from the facts, we have no authority to substitute our decision for that of the trial court. (*In re Stephanie M., supra,* 7 Cal.4th at pp. 318-319.)

It does not appear from the record that the court would have made a different determination if a hearing had been conducted immediately upon the change of placement pursuant to section 387. Appellant argues that Bethany and Justin were denied a fair opportunity to bond with A.L. after Ben and Bonnie separated. However, the

respective levels of attachment were already well established when Ben and Bethany separated. A.L. had lived with Bonnie for 10 of the 22 months of her life. Before she lived with Bonnie, Bonnie had been regularly involved in her care. Bethany and Justin had always been monthly visitors. Dr. Beiley testified that attachment begins at 4 months and reaches a maximum at 15 months. Dr. Beiley testified that even if Bethany and Justin had continued to see the child monthly from May to October, the level of their attachment would not have changed.

The trial court did not abuse its discretion when it denied the modification petition. "The overriding concern of the dependency proceedings . . . is not the interest of extended family members but the interest of the child." (*In re Lauren R.* (2007) 148 Cal.App.4th 841, 855.)

DISPOSITION

The order appealed from is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P. J.

PERREN J.

James E. Herman, Judge

Superior Court County of Santa Barbara

Anne E. Fragasso, for Defendant and Appellant.

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